

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Cassandra Fenkel	Team: Squad #14	CCRB Case #: 201704971	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Sunday, 06/18/2017 4:15 AM	Location of Incident: Academy Street between Nagle Avenue and Post Avenue	Precinct: 34	18 Mo. SOL 12/18/2018	EO SOL 12/18/2018	
Date/Time CV Reported Sun, 06/18/2017 3:37 PM	CV Reported At: CCRB	How CV Reported: On-line website	Date/Time Received at CCRB Sun, 06/18/2017 3:37 PM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Johnny Diaz	31661	915603	034 PCT
2. POM Jonathan Carter	27848	950164	034 PCT
3. POM Wilfredo Burgos	13254	953710	034 PCT
4. SGT Ashleigh Sofia	5468	941249	034 PCT
5. POM Michael Levy	29982	954059	034 PCT
6. POM Nicholas Kane	06822	948057	034 PCT

Officer(s)	Allegation	Investigator Recommendation
A.SGT Ashleigh Sofia	Abuse: Sergeant Ashleigh Sofia stopped the vehicle in which § 87(2)(b) and individuals were occupants.	
B.POM Michael Levy	Abuse: Police Officer Michael Levy stopped the vehicle in which § 87(2)(b) and individuals were occupants.	
C.POM Nicholas Kane	Abuse: Police Officer Nicholas Kane stopped the vehicle in which § 87(2)(b) and individuals were occupants.	
D.POM Johnny Diaz	Abuse: Police Officer Johnny Diaz questioned § 87(2)(b)	
E.POM Johnny Diaz	Abuse: Police Officer Johnny Diaz frisked § 87(2)(b)	
F.POM Johnny Diaz	Abuse: Police Officer Johnny Diaz frisked an individual.	
G.POM Johnny Diaz	Abuse: Police Officer Johnny Diaz frisked an individual.	
H.POM Nicholas Kane	Abuse: Police Officer Nicholas Kane frisked an individual.	
I.POM Jonathan Carter	Abuse: Police Officer Jonathan Carter frisked § 87(2)(b)	
J.POM Johnny Diaz	Abuse: Police Officer Johnny Diaz searched the vehicle in which § 87(2)(b) and individuals were occupant.	

Officer(s)	Allegation	Investigator Recommendation
K.POM Nicholas Kane	Abuse: Police Officer Nicholas Kane threatened to seize an individual's property.	
§ 87(2)(g), § 87(4-b)		

Case Summary

On June 18, 2017, § 87(2)(b) called the CCRB and filed this complaint on behalf of his girlfriend, § 87(2)(b) his friend, § 87(2)(b) and three individuals whom § 87(2)(b) refused to identify due to potential probation violations.

On June 18, 2017, at approximately 4:15 a.m., § 87(2)(b) was driving home from Playroom, a nightclub located at 3964 10th Avenue in Manhattan. § 87(2)(b) turned onto Academy Street and Post Avenue, where he was signaled to pull over by the turret lights of an unmarked black sedan occupied by Sgt. Ashleigh Sofia, PO Michael Levy, and PO Nicholas Kane, all of the 34th Precinct (**Allegation A: Abuse of Authority, § 87(2)(g)** **Allegation B: Abuse of Authority, § 87(2)(g)** **Allegation C: Abuse of Authority, § 87(2)(g)** § 87(2)(b) pulled over immediately. Seconds later, PO Johnny Diaz, PO William Burgos, and PO Jonathan Carter, all of the 34th Precinct, arrived at the location.

PO Diaz allegedly asked § 87(2)(b) if he was drinking and if he would take a breathalyzer test (**Allegation D: Abuse of Authority, § 87(2)(g)** PO Diaz ordered § 87(2)(b) to exit his vehicle and frisked him (**Allegation E: Abuse of Authority, § 87(2)(g)** § 87(2)(b) and the three unidentified individuals were also ordered to exit the vehicle. PO Diaz frisked two of the unidentified individuals (**Allegation F: Abuse of Authority, § 87(2)(g)** **Allegation G: Abuse of Authority, § 87(2)(g)** and PO Kane frisked the third unidentified individual (**Allegation H: Abuse of Authority, § 87(2)(g)** PO Carter allegedly frisked § 87(2)(b) (**Allegation I: Abuse of Authority, § 87(2)(g)**

§ 87(2)(b) and the three unidentified individuals stood at the rear of § 87(2)(b) vehicle while PO Diaz allegedly searched it (**Allegation J: Abuse of Authority, § 87(2)(g)** One of the unidentified individuals held his cell phone at his side and PO Kane allegedly told him to put his phone away or he would take it away (**Allegation K: Abuse of Authority, § 87(2)(g)**

No arrests or summonses resulted.

§ 87(2)(g), § 87(4-b)

§ 87(2)(b)

There is no video evidence in this case.

Findings and Recommendations

Allegation A – Abuse of Authority: Sergeant Ashleigh Sofia stopped the vehicle in which § 87(2)(b) and individuals were occupants.

Allegation B – Abuse of Authority: Police Officer Michael Levy stopped the vehicle in which § 87(2)(b) and § 87(2)(b) were occupants.

Allegation C – Abuse of Authority: Police Officer Nicholas Kane stopped the vehicle in which § 87(2)(b) and individuals were occupants.

Allegation D – Abuse of Authority: Police Officer Johnny Diaz questioned § 87(2)(b)

§ 87(2)(b) (Board Review 01) testified that he was driving his 2016 silver Ford Explorer, registered to him and with New Jersey license plates. § 87(2)(b) described that his vehicle has factory-issued tints on the rear driver's side and rear passenger's side windows, as well as the rear windshield. He did not know the tint percentage. After leaving Playroom, § 87(2)(b) planned to stop at § 87(2)(b) in Manhattan to drop people off, and after approximately two minutes

of driving, § 87(2)(b) was signaled to pull over by the lights of an unmarked black sedan. § 87(2)(b) pulled over immediately. PO Diaz approached § 87(2)(b) window and informed him that he was speeding, driving recklessly, and had run a red light, which § 87(2)(b) denied. PO Diaz ordered § 87(2)(b) to produce his license and registration, which § 87(2)(b) immediately provided. PO Diaz allegedly asked § 87(2)(b) if he was drinking and if he would take a breathalyzer.

§ 87(2)(b) (Board Review 02) testified that § 87(2)(b) vehicle had factory-issued tints on all of his rear windows and alleged that PO Diaz asked § 87(2)(b) if he was drinking and if he would take a “sobriety test.”

§ 87(2)(b) (Board Review 03) testified that PO Diaz informed § 87(2)(b) that he was speeding and ordered him to produce his license and registration. After § 87(2)(b) provided his license and registration, PO Diaz immediately ordered everyone to exit the vehicle. § 87(2)(b) did not allege that PO Diaz questioned § 87(2)(b) about drinking.

Sgt. Sofia (Board Review 04) and PO Kane (Board Review 05) testified that § 87(2)(b) was pulled over due to the excessive tints on his front and rear driver’s side and passenger’s side windows. Sgt. Sofia denied that there was anything else § 87(2)(b) could have been pulled over for, while PO Kane could not recall. § 87(2)(b) tints were recognized as being above the legal limit because neither officer could see inside of the vehicle at all through the windows. No tint test was ultimately conducted as none of the officers had a tint meter on them. The incident concluded with PO Diaz instructing § 87(2)(b) to remove his tints. Neither Sgt. Sofia nor PO Kane recalled if PO Diaz asked § 87(2)(b) if he was drinking or if he would take a breathalyzer test.

PO Burgos (Board Review 06) testified that PO Levy informed him that § 87(2)(b) vehicle was pulled over for windows tints, however, in his CCRB interview, PO Levy (Board Review 07) testified that he did not know why § 87(2)(b) vehicle was pulled over. Neither PO Burgos nor PO Levy recalled hearing PO Diaz ask § 87(2)(b) if he was drinking or if he would take a breathalyzer test.

PO Diaz (Board Review 08) testified that upon arrival, he immediately exited his patrol car and approached the driver’s side window, where he spoke to § 87(2)(b) and ordered him to produce his license and registration. PO Diaz did not recall if he learned what § 87(2)(b) was pulled over for. PO Diaz did not recall asking § 87(2)(b) if he was intoxicated and if he would take a breathalyzer test. PO Diaz did not carry a breathalyzer test, and he denied there was any indication that § 87(2)(b) was intoxicated.

PO Carter (Board Review 09) testified that he stood at the rear of § 87(2)(b) vehicle and was unable to overhear any of the conversation that occurred between § 87(2)(b) and PO Diaz. PO Carter did not know why § 87(2)(b) vehicle was pulled over, and did not recall if he had tinted windows.

§ 87(2)(b) disputes each of the alleged VTL infractions he said he was accused of committing and said he had legal, factory-issued tints on his windows, which the officers disputed. Since the officers did not test the windows for tints or issue a corresponding summons, there is no additional evidence to indicate that § 87(2)(b) tints were in violation.

§ 87(2)(g)

Allegation E- Abuse of Authority: Police Officer Johnny Diaz frisked § 87(2)(b)

Allegation F – Abuse of Authority: Police Officer Johnny Diaz frisked an individual.

Allegation G – Abuse of Authority: Police Officer Johnny Diaz frisked an individual.

Allegation H – Abuse of Authority: Police Officer Nicholas Kane frisked an individual.

§ 87(2)(b) testified that he told PO Diaz he had nothing in his vehicle, was not drunk, and that he should therefore just be given a ticket. PO Diaz ordered § 87(2)(b) to exit the vehicle. § 87(2)(b) complied. PO Diaz frisked § 87(2)(b) patting down his arms, torso, and legs. § 87(2)(b) alleged that the three unidentified individuals whose names he refused to provide were also frisked, though he could not recall by whom. After the frisks, § 87(2)(b) and the three unidentified individuals stood at the rear of his vehicle. PO Diaz asked the individual who was seated in the middle of the backseat “Didn’t I arrest you for a firearm before?” This individual remained silent and rolled his eyes.

§ 87(2)(b) testified that PO Diaz patted down § 87(2)(b) shoulders, torso, waistband, and legs. § 87(2)(b) also alleged that she saw an officer, she was unable to see who, frisk two of the three unidentified individuals along their shoulders, waistbands, and legs. § 87(2)(b) was unsure if the third unidentified individual was frisked as she had walked away from the vehicle prior to this individual exiting from it.

§ 87(2)(b) did not observe § 87(2)(b) or any other individual be frisked.

PO Diaz testified that while he spoke to § 87(2)(b) at the front driver’s side window, he noticed three individuals seated in the back. PO Diaz recognized the individual seated in the middle backseat as someone he previously arrested for criminal possession of a loaded firearm approximately four years prior in the vicinity of Nagle Avenue and Arden Street in Manhattan. PO Diaz could not recall the name of this individual, who he described as a black man in his early twenties. PO Diaz observed this individual move his hands from his lap to his legs and then down by his feet. PO Diaz could not see what this individual was doing or if he had anything in his hands. Based on these movements, PO Diaz believed this individual was concealing a weapon.

PO Diaz ordered § 87(2)(b) to exit his vehicle. § 87(2)(b) complied. PO Diaz frisked § 87(2)(b) along his waistband, pants pockets, and ankles. PO Diaz testified that he frisked § 87(2)(b) to ensure he had no weapons on him. PO Diaz did not observe any bulges on § 87(2)(b) and had no specific reason to suspect § 87(2)(b) was armed. After § 87(2)(b) was frisked, PO Diaz directed him to stand at the rear of his vehicle, and ordered the three individuals in the backseat to exit the vehicle. The individual seated behind the driver’s seat exited first, followed by the individual PO Diaz previously arrested. PO Diaz frisked both of these individuals along their waists, pants pockets, and ankles with negative results. After these individuals were frisked, they joined § 87(2)(b) at the rear of his vehicle. When asked why the individual seated behind § 87(2)(b) was frisked, PO Diaz stated, “I frisk everybody for my safety and the safety of other officers.” PO Diaz did not recall if he observed any bulges on this individual, but denied that he had any specific reason to suspect this individual was armed. PO Diaz frisked the individual seated in the middle backseat, solely because of his prior arrest history and above-described movements inside the vehicle.

PO Kane testified that he ordered the individual seated behind § 87(2)(b) to exit the vehicle. The individual complied, and PO Kane frisked him along his waistband, pants pockets, and legs. PO Kane testified that he frisked this individual due to concerns for his safety, as “you never know” if someone has a weapon. PO Kane did not observe any bulges on this individual, and had no specific reason to suspect this individual was armed. PO Kane did not observe any

other frisks, but testified that all of the occupants of the vehicle were frisked because doing so was “normal procedure.”

PO Levy testified that PO Diaz frisked § 87(2)(b) and the individual seated behind him along their pants pockets and legs. PO Levy did not recall seeing PO Diaz frisk anyone else. PO Burgos testified that PO Diaz frisked § 87(2)(b) and one of the individuals seated in the rear, though he could not recall who. PO Carter denied that he witnessed any officer frisk anyone, but testified that he believed § 87(2)(b) and the three individuals in the rear were all frisked because he saw them exit the vehicle, turn around, and place their hands on top of the vehicle as if they were about to be frisked. Sgt. Sofia did not witness this aspect of the incident, as she escorted § 87(2)(b) to urinate a few car-length away during this time.

PO Levy and PO Kane, who stood at the rear doors on the driver’s side and passenger’s side of § 87(2)(b) vehicle, respectively, denied that they saw anyone in the backseat make any movements inside the vehicle. PO Burgos, who also stood at § 87(2)(b) rear driver’s side window, said he observed one of the occupants, he could not recall who, moving around inside the vehicle, but he could not recall specifically what this individual was doing. Sgt. Sofia, who stood at the front passenger’s side window, did not recall if she observed anyone in the backseat make any movements. PO Carter, who stood behind the vehicle, testified that he could only see the heads of the individuals in the backseat.

Behavior which is susceptible of innocent as well as guilty interpretation will not generate reasonable suspicion that criminality is afoot. People v. Baretto, 161 A.D.2d 303 (1st Dept. 1990) (Board Review 10). Furtive movements and nervous behavior, absent more, will not provide the police with a founded suspicion of criminality. People v. Garcia, 20 N.Y.3d 317 (2012) (Board Review 11). An officer’s knowledge of a suspect’s past arrest is an insufficient basis on which to find objective suspicion of criminality. People v. Brown, 115 A.D.3d (1st Dept. 2014) (Board Review 12). A frisk is permissible only if the police possess a particularized reasonable suspicion that the suspect is armed and may be dangerous. People v. Russ, 61 N.Y.2d 693, 695 (1984) (Board Review 13).

§ 87(2)(g)

§ 87(2)(g)

Allegation I – Abuse of Authority: Police Officer Jonathan Carter frisked § 87(2)(b)

§ 87(2)(b) alleged that PO Carter patted him down under his arms, down the sides of his torso, his pants pockets, and down his legs. Later in the incident, PO Carter spoke with one of the unidentified individuals about sneakers.

Both § 87(2)(b) and § 87(2)(b) consistently testified that § 87(2)(b) was frisked, though § 87(2)(b) alleged PO Diaz conducted frisk and § 87(2)(b) could not recall who frisked § 87(2)(b).

§ 87(2)(b) described PO Carter as a dark-skinned man with dark hair, standing approximately 6’1” tall, with an athletic build, and in his early thirties. After he allegedly frisked § 87(2)(b), PO Carter spoke to one of the unidentified individuals about sneakers. PO Carter, whose CCRB Interview Report Worksheet (Board Review 31), describes him as a black man with black hair, standing 6’2” tall, weighing 210 pounds, in his early thirties, acknowledged talking about shoes with one of the unidentified individuals. However, PO Carter did not recall frisking anyone during the incident.

PO Diaz, PO Burgos, PO Levy, and PO Kane denied seeing any officer frisk § 87(2)(b).

§ 87(2)(g)

Allegation J – Abuse of Authority: Police Officer Johnny Diaz searched the vehicle in which § 87(2)(b) and individuals were occupant.

§ 87(2)(b) testified that after he exited his vehicle, he immediately told PO Diaz that he did not have consent to search it. However, while standing at his trunk, § 87(2)(b) looked over his shoulder and allegedly observed PO Diaz lean waist deep into his open front driver’s side door. PO Diaz remained there for a few minutes and opened § 87(2)(b) center console. § 87(2)(b) did not see PO Diaz enter or search any other areas of his vehicle.

§ 87(2)(b) testified that PO Diaz briefly reached into the front driver’s side of the vehicle to place § 87(2)(b) wallet on the front driver’s seat. § 87(2)(b) denied seeing PO Diaz enter the vehicle at any other point or conduct a further search. § 87(2)(b) could not recall if any officers entered or searched § 87(2)(b) vehicle.

PO Diaz acknowledged searching § 87(2)(b) vehicle, and testified that he did so because he believed that the individual whom he previously arrested may have hid something inside the vehicle. PO Diaz also testified that § 87(2)(b) told him he could search his vehicle. PO Diaz testified that he leaned waist deep into the front and rear driver’s side doors, and looked underneath the driver’s seat, between the driver’s seat and the center console, underneath the rear seats, and inside the seatback pockets on both the front driver’s seat and front passenger’s seat. PO Diaz denied that he searched the center console or any other area of the vehicle.

PO Burgos, PO Levy, Sgt. Sofia, and PO Kane consistently testified that § 87(2)(b) provided PO Diaz with consent to search his vehicle. PO Levy testified that PO Diaz leaned waist deep into the front and rear driver’s side doors, and looked underneath the seats. Sgt. Sofia, PO Kane, and PO Carter testified that PO Diaz leaned waist deep into only the front driver’s side door for approximately one minute. Sgt. Sofia, PO Levy, PO Kane, and PO Carter denied seeing

PO Diaz search any other areas of the vehicle, including the center console. PO Burgos did not recall PO Diaz entering or searching § 87(2)(b) vehicle.

§ 87(2)(g)

Allegation K – Abuse of Authority: Police Officer Nicholas Kane threatened to seize an individual's property.

§ 87(2)(b) testified that while standing at the rear of § 87(2)(b) vehicle, one of the unidentified individuals held his cell phone at his side. § 87(2)(b) assumed he was calling his girlfriend, as the individual said, “I got stopped.” PO Kane allegedly threatened the individual to put his phone away or he would take it away.

Neither § 87(2)(b) nor § 87(2)(b) raised this allegation in their CCRB testimonies.

PO Kane testified that as he spoke with the civilians at the rear of § 87(2)(b) vehicle, an unidentified individual appeared to be texting on his cell phone. Within five seconds of him having his phone out, PO Kane stated, “Do me a favor. Stay off your phone.” The individual initially complied and put his phone away, but took it out again a minute later. PO Kane stated, “Listen. Do me a favor. Put the phone away. I don’t know what you’re doing, but you can’t have it out right now.” PO Kane testified that he feared the individual was revealing the officers’ location or texting someone to come to the scene. PO Kane did not recall saying, “Put your phone away or I’ll take it away.”

PO Diaz, PO Burgos, PO Levy, Sgt. Sofia, and PO Carter consistently testified that they did not recall any civilian having their cell phone out, and denied hearing any officer threaten to seize anyone’s phone.

§ 87(2)(g)

§ 87(2)(g), § 87(4-b)

§ 87(2)(g), § 87(4-b)

- This is the first CCRB complaint involving § 87(2)(b) (Board Review 24), § 87(2)(b) (Board Review 25), and § 87(2)(b) (Board Review 26).
- PO Diaz has been a member-of-the-service for 22 years and has had seven additional CCRB complaints filed against him involving 18 allegations. § 87(2)(g)

- PO Levy has been a member-of-the-service for four years and has had one additional CCRB complaint filed against him § 87(2)(b)
- Sgt. Sofia has been a member-of-the-service for 11 years and has had two additional CCRB complaints filed against her involving two allegations, none of which were substantiated or § 87(2)(g)
- PO Kane has been a member-of-the-service for eight years and has had two additional CCRB complaints filed against him involving three allegations, none of which were substantiated or § 87(2)(g)
- PO Burgos has been a member-of-the-service for four years and has had one additional CCRB complaint filed against him involving one allegation, which was not substantiated and does not § 87(2)(g)
- PO Carter has been a member-of-the-service for six years and has had one additional CCRB complaint filed against him involving two allegations, none of which were substantiated or § 87(2)(g)

Mediation, Civil and Criminal Histories

- § 87(2)(b) rejected mediation.
- A Notice of Claim has not been filed with NYC Comptroller's Office regarding this incident (Board Review 27).
- § 87(2)(b); §§ 86(1)(3)(4); § 87(2)(c)
- § 87(2)(b); §§ 86(1)(3)(4); § 87(2)(c)

Allegation not pleaded

Frisk: Though Sgt. Sofia testified that she frisked § 87(2)(b) did not raise this allegation in her CCRB interview, and specifically denied that any officer patted her down or reached into her pockets. Therefore, no frisk allegation has been pleaded.

Squad: #14

Investigator:	_____	_____	_____
	Signature	Print	Date
Squad Leader:	_____	_____	_____
	Title/Signature	Print	Date
Reviewer:	_____	_____	_____
	Title/Signature	Print	Date

